IN THE

Supreme Court of the United States

October Term, 1961

Number **601**

RAY C. BALLANTYNE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

Ray C. Ballantyne, your Petitioner, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on August 3rd, 1961 and the Judgment of said Court on October 11th, 1961, withdrawing a portion of the basic opinion and substituting other and different language therefor and denying Motion for Rehearing.

Opinions Below

The basic opinion, Appendix "A" is reported at 293 Federal 2d 112. The opinion on Petition for Rehearing, Appendix "C" is not yet reported.

Jurisdiction

The Judgment of the Court of Appeals was entered on August 3rd, 1961, R. 442. Timely Petition for Rehearing was filed on August 23rd, 1961, R. 443, and denied on October 11, 1961, R. 467. Time to file Petition for Writ of Certiorari was extended by Honorable Hugo L. Black, Associate Justice of the Supreme Court of the United States, by order dated November 8th, 1961, to and including December 10th, 1961 (Motion Docket of this Court). The jurisdiction of this Court is invoked under 28 USCA, Section 1254.

Questions Presented

1. Whether, where the defendant is charged with income tax evasion, and he contended that money received by him constituted a return of capital which had not been reported because it was not income and the Court ruled that proof of repayment of capital was not a defense if the repayment had not been reported, it is necessary to make further offer of all facets of proof of the ultimate issues where the trial Court announced that proof of the defense would not be permitted.

2. Whether, in the situation in 1, above when the defendant had offered to prove the *first link in the chain* of evidence to show a return of capital to him by inquiring as to whether payment of the debt claimed to constitute the return capital had been made and the

Court interjected and was advised by the defense that defendant proposed to prove by the witness a debt to defendant which when paid was a *return of capital* and not income, and so considered by the defendant, and the Court then refused to permit further examination as to the claimed debt, the defendant was required to proceed to re-offer specifically all facets of the proof of the debt.

3. Whether, in 1 and 2 above, after the statement by defendant that his basic legal defense was that the money with reference to which he was charged with evading taxes was not income but was wholly a return of capital to him, the Court erred in refusing to permit proof of the mixed question of law and fact showing repayment of indebtedness to defendant.

4. Whether, in 1, 2 and 3 above, where a question was propounded to a witness as to whether a corporation had paid defendant for defendant's assets transferred to the Corporation was followed by the statement to the Court that his defense was that money charged in the indictment was not income but a return of capital, such question propounded was the first link in a logical development of the ultimate issue—return of capital, and therefore admissible.

5. Whether, in 1, 2, 3 and 4 above, where a witness had been asked whether a corporation had paid defendant for property transferred to it and the Court made inquiry with reference to the question and was advised that the defense of defendant was that all money involved was a return of capital from the corporation and not income and that defendant was beginning to prove the *ultimate issue*, to wit—that the sume in the indictment were a "return of capital" the question being a part of such extended proof, the Court erred in refusing to permit proof of such defense.

The Statutes Involved

Section 145 (b) Internal Revenue Code of 1939; 26 USCA Section 145 (b).

Section 7201 Internal Revenue Code of 1954; 26 USCA 7201, printed in Appendix "E" hereto.

Statement

Prosecution was for tax evasion for 1953 and 1954. The defense is that the amount received in excess of that included in the returns was not, and was not believed to be income, but was a return of *capital* indebtedness from Balco, Inc., a corporation. In 1948 the Defendant transferred all his operating assets, including contracts in the process of execution, some of which were "cost-plus" or "cost-plus-a-fixed-fee" contracts and all machinery, equipment, etc., to Balco, Inc., hereinafter called Balco.

Balco had a contract with the City of Pasadena, Texas, to install sewer pipes.

The Government's proof, from Balco's accountant, showed that Balco was not permitted to bid on "material or pipe" for the contract in Balco's name so therefore he had to turn in a bid using an assumed name in which he took the initials of the Ballantyne Engineering Company as the name of it " . . . and called it Beco and added the Engineering and Specialties to it". (Tr. 185) (Tr. 191)

(Petitioner "considered this B&B and BECO simply an adjunct and a part of the Balco Company operation?") These contentions were made long prior to the trial in conferences with the Government. (R. 334)

"B & B Products Company" was later utilized as a vehicular name to sell pipe to the city. Defendant proved the transfer to Balco of all contracts held by him at "time of

incorporation" and offered to prove "a liability of Balco, Inc., to Mr. Ballantyne" (Tr. 199, 200), because the contracts transferred to Balco by Defendant for which the corporation was indebted to Defendant and then expanded the offer to include " . . . all the net worth and assets, machinery, equipment, whatever belonged to Mr. Ballantyne, whatever contracts were in his name, whatever he was doing, which was unsatisfied obligations on his part, and all the equipment, the dragline and everything else, was simply dumped into Balco." "Mr. Ballantyne got no credit for it. It was simply something the corporation owed him." " . . . unsatisfied value of the corporation itself to Mr. Ballantyne . . ." (Tr. 201), that " . . . he had a right to get even or become financially even with the corporation".

The Court queried: "You mean without accounting for any money that he took in?".

Counsel explained that it was a "return of capital from Balco" and "therefore, under any circumstances there wouldn't be taxes owed under any year because it would be a return of capital" (referring to the years charged in the indictment).

The Court then stated:

> "I can understand why all of the income, if it is a corporation, owed Mr. Ballantyne, that all of the income could well have been taken by him to repay what he (was) owed, but that wouldn't excuse him for making some accounting for it." (Tr. 203)

The Court took the position that Defendant would be required to "account" for money received by way of repayment of indebtedness to him and that the nature of

such funds "wouldn't excuse him from making some accounting of it".

Counsel reminded the Court that the charge was evading a tax and not failure to include the sums in a return. (Tr. 203)

> The Court: "Well, I know, but failure to *include in* the return—I don't understand this income tax business, that I can make my own conclusions as to whether I am making money. I can just put in—I can take a lot of money in and say I'm now paying myself back for something I advanced to the corporation. Therefore, I won't put it in my return. I don't believe you can do that". (Tr. 204)

The Court related the claimed repayment of indebtedness by Balco to the Defendant to the sums charged in the indictment and denied that a repayment of this indebtedness of Balco to the Defendant was free from reporting or accounting requirements. Defendant's counsel then distinguished "reporting" of "income" and asserted that "movement of money does not make income, just like accounting concepts do not make income" and "that he had a right to take what belonged to him as a return of capital which he had placed in the hands of the corporation". The Court: "Wouldn't he have to make an income tax return? Suppose he got $50,000 from this corporation for the year 1953", *(referring to Balco and the year 1953 in the indictment)* "which you claim now was to repay him for equipment and everything else, is it your contention that he just ignore that in making an income tax return?"

Counsel for Defendant then sought to persuade the Court to recede from his stated position:

> "Capital returned to a taxpayer is not a taxable item. It is not an item that has to be reported. It doesn't have to be reported and there is nothing on the forms which require it". (Tr. 205)

Trial counsel then sought to distinguish the elements of an income tax evasion, but the Court *cut him off by interrupting him* and concluded his statement by saying " . . . *but I am not going to let you go into all this other business.*" (referring to the return of capital and repayment of indebtedness of Balco to Ballantyne which he had considered to be offered and rejected as a defense if not reported). (Tr. 205)

The Court understood that the defendant was offering to prove that the net money received by him from the total pipe sales from the assumed name accounts *on behalf of Balco,* received by him and not put into Balco, *was money claimed by the Defendant to belong to Balco and being repaid to the Defendant.* Counsel then further added that " . . . and that would be relevant to the inquiry and particularly as to his *state of mind and willfulness in the years in issue*", thus placing additionally before the Court that Defendant *considered and believed* that such portion of the pipe sales as came to him were *from the operations of Balco* in repayment of Balco's indebtedness to him and related this necessary element of willfulness to the *"years in issue"*, thus referring *specifically to the amounts and charges and elements of proof in the indictment under which he was being tried.* (Tr. 206)

Government counsel stated:

> "If the books and records this man has here can show all he is talking about we would like to see it too. We have not found any such record of these debts". (Tr. 207)

This statement of counsel reflects his understanding concurrent with that of Defendant's counsel and the Court of the offer of proof. The Court then, following Government counsel's lead:

> "If you have books and records showing the investment of this corporation—",

and then defendant's counsel queried if he could go back to the date of incorporation (1948) having in mind the delineation of the bounds of evidence by the Court that he would permit a " . . . pattern in '48 and '49, but I am not going to let you go into all this other business". (Tr. 205) Defendant's counsel felt that he would be able to proceed. "All right, sir". (Tr. 207)

Government counsel then objected and the Court sustained the objection. (Tr. 207)

The trial court held that proof of repayment of indebtedness was immaterial in the absence of having reported such repaid sums. The Court clearly understood and stated:

> "The record will show you offered to prove by this witness substantially what you said here." (Tr. 208) (referring to the whole of the colloquy.)

The Court held as a blueprint for the trial that the fact that funds constituted a return of capital was not available as a defense to a charge of income tax evasion in the absence of reporting it on the tax return.

The Court's charge made *no distinction* between the corporation, Balco, B & B Products Company and Beco Engineering Specialties Company. In holding to his ruling that the source and nature of funds is not relevant—it must be reported:

> "In this case if the defendant was using these various names that you have heard here—*Beco, B & B, Balco*—I don't know whether there are others or not but you will recall the testimony—he could use the names if he wanted to, but if he was using and you are satisfied from this evidence that he was using them to hide income, to conceal income. . . . (Tr. 395)

and further charged the jury:

> "If you find the defendant was the owner of substantially all of the stock of *Balco Company* and he used the funds belonging *to that corporation* for his personal use, you may find that such use constituted the use of a dividend, constructively received by him from such corporation, even though no formal declaration of a dividend was made by the corporation. If he was using this corporation, *taking money out of it* and failing to *make account* of the *money he took out* to the federal government, if he put it in his own personal account and *it was not included in his income tax return* and he did that willfully and knowingly, then of course you may take that into consideration in determining what his intent was." (Tr. 397-398) (Emphasis supplied).

There the Court gave official voice to his understanding that the Beco and B and B funds belonged to Balco and Ballantyne had received this same money from Balco during 1953 and 1954, the indictment years, and authorized the jury to find guilt if such sums (B & B, Balco and Beco) were "not *included* in his income tax return". (Tr. 398) (Emphasis supplied), rejecting proof that the money involved was a repayment of indebtedness and therefore nontaxable.

He ruled out also the claim of the Defendant that if the Defendant *considered* and *believed* the sums were non-

taxable that would destroy the "willfulness" required under the statute.

The Court of Appeals referred to the *failure of the defendant to testify.* This reference was not withdrawn in the corrected opinion. In its corrected opinion, it determines that none of the testimony offered was material to or tended to prove that the moneys were repayments to him by his *debtors of their* indebtedness to him.

The ruling of the Court of Appeals is not understood. There was *no claim anywhere* that there were *several and multiple debtors.* It may be that the Court of Appeals is confused and considered that Beco Engineering Specialties and B & B Products Company were the debtors of Ballantyne, but of course that is not the record of the trial court's understanding, which is that the defendant's debtor was the Balco, Inc. In fact Beco Engineering Specialties was not registered in the assumed name Records as stated by the appellate court.

Defendant's counsel had stated:

> "Let my statement constitute the bill of exceptions in view of the fact the Court understands it." (Tr. 207)

clearly referring to the whole of the colloquy wherein the trial court specifically referred to Balco, Inc. as the debtor corporation. The Court said:

> "The record will show you offered to prove by this witness substantially what you said here". (Tr. 208)

referring without limitation to the whole of the colloquy and the understanding of all participants in the trial.

Reasons for Granting the Writ

The decision of the Court below is clearly erroneous as a matter of general law. Its assessment of the ground of decision of the trial court is completely in error. It is directly in conflict with the decision of this Court in *McCandless v. U. S.*, 298 U.S. 342, holding that all facets of proof of the ultimate issue need not, indeed, cannot, be offered at the same time and further that once a field of evidence or defence has been foreclosed by the trial court, further efforts to offer similar evidence is not required.

In *Lincoln v. McCandless*, 298 U.S. page 342, this Court held that an offer of proof cannot be denied as remote or speculative because it does not cover every fact necessary to prove the issue, but it is enough if it is an appropriate link in the chain of proof. The Government did not initially object to the offer of proof that Petitioner had not been paid by Balco for assets transferred to it. (Tr. 199-200), but the trial court by immediately interjecting and *taking over* the examination formally determined the whole scope and character of the defense by a combination of statement and offers of specific proof by counsel and was under no misapprehension that the offered evidence and proof of the Petitioner was that the moneys mentioned in the indictment and for the years in the indictment referred to by the trial judge *belonged to Balco* and was taken by Petitioner to pay its debt to him (the Government had already proved the formation of Balco (Tr. 194-196) presumably in preliminary rebuttal of the stated position long before taken by Petitioner that B & B and BECO were simply "adjuncts" to Balco and a part of its operations. (Tr. 334). The trial court's ruling was made with

that understanding of the facts with full knowledge of the factual and legal position of the Petitioner. Additional formal and specific offers of proof by witnesses or otherwise would have been a stultification of the judicial process.

In McCandless the Court said: "The action of the trial court in rejecting the offers plainly meant that it would be useless to offer further evidence supplementing and dependent upon that which had been rejected. Faced with this ruling and implication, counsel was not required to offer further evidence along that line." Page 347, The Court further held "that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* (emphasis of the Supreme Court) appears from the whole record that it was not prejudicial." Page 348. Here, the crucial issue presented is decisive of liberty. Petitioner should have been accorded an opportunity to prove his contentions in an orderly way.

The rule of the *McCandless* case was reaffirmed in *Bihn v. U. S.*, 328 U.S. 633 reciting that the "harmless error" statute, 28 USC 391 (1946) does not change the rule as stated in McCandless and stating further that Rule 52(a), *Federal Rules of Criminal Procedure* providing that "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded" is "merely a restatement of existing law" and effects no change in the "harmless error" rule. Page 638, To a like effect, subsequent to the revision of the Judicial Code is *U. S. v. Williams*, 203 Fed. 2d 572 (CCA 5) citing McCandless.

As a matter of common sense, an actual offer of evidence upon an issue is not necessary to preserve the question for review if the trial court rules as here, that no proof

upon that issue will be received. 3 *Am. Jur.* 354 Note 17, 21 LRA (N.S.) 354, *Palmer v. La Rault*. *In Palmer La Rault* the trial court had announced that appellant would "not be permitted to introduce any proof tending to sustain the counterclaim". The court stated that "In accepting the announcement of the court as final, the appellant was within the bounds of propriety. He should not be deprived of his right to have the error of the court considered because of his decorum."

Quite clearly here the Court on its own motion and responsibility determined the whole basis of the defense, to-wit, that the money mentioned in the indictment as taken by the Petitioner belonged to Balco, not to himself, and was so considered by Petitioner as belonging to Balco and taken to repay Balco's debt to him which constituted a return of capital—a repayment of indebtedness.

Before the Court interrupted Petitioner's counsel and took charge of the examination, Petitioner's counsel offered to prove the specific debtor relationship of Balco to the Petitioner with reference to matters already opened up and touched on by the government. (Tr. 199-200) This was the logical beginning "link in the chain of proof" to show that a debt and thereafter the repayment of that debt by funds of the debtor.

To say that the trial Court's ruling was not made on the basis of his stated understanding is to ignore the printed record.

The two ultimate defensive issues were: 1 whether the sums charged in the indictment constituted a return of capital and whether, without reference to the technical nature of these sums as capital or income, whether the Defendant believed they constituted a return of capital

and thus destroyed the element of willfulness necessary for conviction.

If these sums were in fact a return of capital, no tax consequences ensued, no taxes were due and criminal intent would be immaterial since a conviction could not otherwise be sustained. If such sums did not constitute a return of capital in fact by reason of the law or the facts, then lack of willfulness would still be a defense, that is if the defendant did not intend to evade a tax by reason of his view that the corporation owed him these sums as a repayment of its indebtedness to him incurred when he transferred all of his assets to the corporation upon its formation without having received any compensation therefor.

"Capital" and "income" are words of technical meaning and significance in the law of Internal Revenue. The determination of what is capital and what is income is a mixed question of law and fact. Likewise, proof of a state of facts showing a repayment of indebtedness constituting therefore a return of capital involves proof of delivery of capital in the first instance, an obligation to repay, and actual payment in return. *Repayment of indebtedness cannot be proved except by a series of factual steps* as stated and cannot be shown to be a return of capital without proof of the nature of the obligation in the first instance.

When the Court "took over" the trial proceedings, the Government had already begun its defensive steps to show that, contrary to Petitioner's claim, B & B and Beco were not "adjuncts" to Balco. He was thus aware of the dispute and clearly ruled out any proof whatever of return of capital, because the money had not been "included" in a tax return.

The colloquy shows that the Court entertained strong opinions requiring all sums received to be "included", "reported", and "accounted for" on an income tax return and once he was satisfied that the sums in the indictment had not been reported and accounted for he refused the Petitioner the right to prove the indebtedness of Balco to Petitioner as a *"first step in the link"* of proving the concept of capital and its repayment to Petitioner by Balco with full understanding of the obvious position of the Petitioner that the money which he was charged with in the indictment was not money which belonged to Ballantyne personally, nor received by him personally, but belonged to Balco prior to repayment of a portion of Balco's debt to him.

In the Federal Courts the admissibility of evidence is governed, except when an Act of Congress or the Rules of Criminal Procedure otherwise provide, by the principles of the common law as they may be interpreted by the Courts of the United States in the light of reason and experience. Rule 26, *Federal Rules of Criminal Procedure.*

The case of *McCandless v. United States*, 298 U.S. 342, sets up a common sense rule of this Court as to admissibility and offers of proof, both as to admissibility and as to the nature of the error in violating such rule. As stated, an offer of proof cannot be denied as remote or speculative because it does not cover every fact necessary to prove the issue. If it be an appropriate link in the chain of proof, it is enough. This Court quoted the Supreme Court of California in *Palmer v. McCafferty*, 15 Cal. 334, 336: "All that the Court can ask is that the particular evidence offered conduces to establish any *one* proposition involved in the issue. . . . *There must be a starting place somewhere,*

and the Court should never reject evidence merely because, unaided by other testimony, it is insufficient, if it tends legally to prove any part of the case." "An offer of proof can not be deemed as remote or speculative because it does not cover every fact necessary to prove the issue". 298 U.S. 342, 346.

The factual bases for the Appellate opinion is not clear but if it is based upon a claimed requirement of a specific offer of proof then it flies in the face of the well established rule that a specific offer of evidence is not needed where an entire class of evidence has been in advance formally declared inadmissible by the trial court during preliminary argument or colloquy; for the Court's ruling relates forward to all possible offers of such evidence and renders them needless. *Wigmore on Evidence*, 3rd Edition, Section 17 (4).

Moreover, after such a ruling, the persistance of counsel in making or repeating such offers may be treated as improper attempts to get before the jury the effect of such evidence. Citing among other cases, *Greatreaks v. U. S.*, 211 Fed. 2d 674, 676. Here the offer rejected was not only the original form of question then before the Court, showing indebtedness of Balco to Petitioner as propounded to the corporation chief accountant, (Tr. 199) but to a whole class of evidence which was formally declared unavailable to the defendant. See 3 *Am. Jur.* 354 page 98, 21 LRA (N.S.) 354.

As to this, the Supreme Court in *McCandless* at p. 347 says: "The action of the trial court in rejecting the offers plainly meant that it would be useless to offer further evidence supplementing and dependent upon that which had been rejected. Faced with that ruling and implication, counsel was not required to offer further evidence along that line."

Conclusion

The trial court ruling was clearly erroneous and based upon a gross misconception of the law.

The appellate court ruling affords no basis for affirmance, is hypertechnical and in violation of plain principles. The petitioner should be permitted to prove he received no income and is thus innocent of the charge.

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Certificate of Service

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was mailed to Honorable Woodrow Seals, United States Attorney, 218 Post Office Building, Houston 1, Texas, and to the Solicitor General, Department of Justice, Washington 25, D. C., postage prepaid, on this the ____ day of December, 1961.

Prayer

For all the foregoing reasons, it is accordingly urged and prayed that a writ of centiorari to review the judgment of the Court below be granted.

JOSEPH W. CASH

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18700

RAY C. BALLANTYNE,

Appellant

versus

UNITED STATES OF AMERICA,

Appellee

Appeal from the United States District Court for the Southern District of Texas

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(August 3, 1961)

Before HUTCHESON, RIVES and WISDOM, Circuit Judges.

HUTCHESON, Circuit Judge: Charged in an indictment in two counts with willful evasion of income taxes for the years 1953 and 1954, and convicted on both counts, defendant has appealed. Assigning many errors, including that of denying appellant's motion for judgment of acquittal for want of evidence, appellant presents as his primary claim that the court misconceived the nature of

the accusation against the defendant and prevented him from making proof that monies received by him in the tax years in question were not, and were not received as, income, but were repayments of indebtedness owing to him, in short were a return of capital.

If we could agree with appellant that the record supports his claim, we would, of course, agree with him that the judgment should be reversed. The difficulty with defendant's case is that the record does not support his assumptions. Appellant did not testify, nor did he offer any convincing testimony in support of his claim that the monies he received on account of contracts were not income but were repayment of indebtedness and, therefore, a return of capital. Neither did he make proffer of any testimony which was refused by the district judge.

The claim he urges with such fervor, that he offered to make proof through his bookkeeper, Morrison, of these facts, and the district judge refused to let him do so, is not supported by the record; neither does the record support his claim that the district judge misconceived the nature of the indictment and mis-charged the jury. On the contrary, the court's instructions showed a complete and correct understanding of the nature of the offense charged and of defendant's defense to it.

The record showing is voluminous and detailed. This is a sufficient and correct summary of it as to the evasion claimed and proved. Ballantyne entered into a contract with the City of Pasadena Texas, to furnish concrete pipe. This was done under the assumed name Beco Engineering Specialities Co. Ballantyne made arrangements to buy the pipe from Standard Concrete Pipe Company, who delivered it to the City, Ballantyne opened a bank account in the name of Beco Engineering Specialities Co., indicating

to the bank that he had a partner named Orin G. Bennett, though the proof showed, indeed Ballantyne admitted that he was non-existent, and that the company name was registered in the assumed name records. Ballantyne either put the receipts into this account or endorsed the checks over to Standard to pay for the pipe. Ballantyne received the bank statements from his accountants as instructed. No record was made of the receipts. The Beco money was sometimes put by Ballantyne into his corporation, Balco, Inc. When this was done, the money was shown on the records as a liability to Beco, at Ballantyne's instruction. This continued from 1950 through 1963. No tax was ever paid by Beco, Ballantyne or Balco, Inc. on the net income. Ballantyne reported only his salary from Balco, Inc. on his tax return, which he signed. He advised his bookkeeper that he had no other income in 1953, and this was passed along to the auditors who prepared the return. In 1954, Ballantyne entered into a similar contract with the City of Pasadena as B & B Products Co. Bayou Concrete Pipe Co. furnished the pipe and was paid for it by Ballantyne, who received the one check, in the sum of $54,600, took it to the bank and cashed it, paid for the pipe, and kept the balance, after splitting it up various ways. No record was made of the transaction and the net income was not included on Ballantyne's tax return for 1954.

The jury was properly instructed and it found on ample evidence that the defendant had received income in the indictment years and had willfully evaded payment of the taxes due on it, and appellant's claim, that the evidence was insufficient to take the case to the jury and that his motion for new trial should have been granted because the finding was a miscarriage of justice, finds no support in

the record, notwithstanding the earnest and fervent assertions in appellant's brief to the contrary.

While these claims: (1) that it was error to deny appellant's request for a directed verdict and his motion for a new trial on the ground of lack of evidence to support the verdict against him; and (2) that the district judge, misapprehending the nature of the offense charged and of appellant's offer of proof that the monies received by him in the tax years in question, which were charged to him as received as income, were in fact received as repayment of indebtedness and a return of capital, and, therefore, were not income; were put forward by appellant and argued as his main ground; appellant did not waive or in any way abandon his many other assignments of error, but, arguing them with apparent conviction, insisted that either standing alone or, in the alternative, together, they were such error as deprived defendant of a fair trial. We cannot agree with this view.

The first of these assignments to be noticed is that, while the district judge, in his order on the application of the defendant for a bill of particulars, restricted the prosecution to proof of specific items of tax income in the years 1953 and 1954, nevertheless, on the theory that the evidence established a pattern of not reporting which had bearing on the question of willfulness and later evasion, he permitted the government to introduce evidence pertaining to the years 1950 through 1953 as a part of a pattern of not reporting, though the government did not prove that any offense had been committed during the prior years, and, therefore, confused a pattern of conduct with a pattern of evasion.

Insisting that this inquiry was completely irrelevant and highly prejudicial and that, since there was no proof of any tax evasion in the earlier years, the testimony was

irrelevant, appellant insists that this ruling and action caused him high prejudice.

The district judge, in his charge, carefully instructed the jury that the evidence as to the earlier years was not admitted as proof of evasion in the tax years but only as bearing upon the existence of a pattern of conduct. It seems to us that it is quite clear that, whether the ruling was correct or incorrect, no prejudice resulted from it. As a matter of fact, since the government had offered the evidence as proof of a pattern of tax evasion occurring in the earlier years, its failure to show such evasion could not have prejudiced defendant but would rather have redounded to his benefit.

We take up next, to reject them, for the reasons following, appellant's objections to the charge.

Of his first objection, to the effect that though the real charge against the defendant was not the failure to report income but willful evasion, the district judge submitted the case to the jury as one of failure to report, we find that an examination of the charge shows that it was not subject to this objection, but that, on the contrary, it carefully, precisely and correctly stated the nature of the indictment and of the proof necesary to sustain it, so that the jury could not have been misled.

Of the second objection, to the effect that the court erred in charging the jury in such a way as to lead it to believe that the failure in issue was the failure to report the sums alleged to be income rather than the felonious attempt to evade the tax, it is sufficient to say that it is impossible for the careful and detailed charge to be read as contended for by appellant, or for it to be read without a conscious feeling that the judge knew exactly what the issue was and charged it with great care and specificity.

In the second paragraph of the charge, the court stating:

> "The grand jury returned an indictment against the defendant in two counts for evasion of income taxes for the years 1953 and 1954."

went on to say that the indictment charged in substance that Ballantyne willfully and knowingly attempted to evade a part of the income tax due and owing to the United States for the tax years in question. Repeatedly thereafter the judge restated the charge in substance in the same terms, and it is impossible to find in the charge any support for this attack upon it.

It is true that the charge did refer to the fact that the defendant prepared and filed a false and fraudulent income tax return wherein the net income for the tax years was incorrectly stated. But nowhere in the charge did the judge advise the jury that the defendant was being prosecuted for the failure to file an income tax return. The whole gravamen of the charge repeated over and over in it was the defendant had been indicted for the knowing and willful evasion of income taxes for the tax years in question.

Throughout, in a most careful and meticulous way, the district judge correctly charged on defendant's presumption of innocence, and the burden of proof on the government necessary to support a conviction.

At one point in the charge, he instructed the jury:

> "The proof must be based upon whether there was an evasion of a substantial amount of the tax for the tax years in question. The exact figures that are charged in the indictment are listed, but the government is not held to prove exact figures. It is whether it is substantially, and that at the

time he filed this joint income tax return of himself and wife there was the sum charged or a substantial amount of said income upon which there was owing to the United States as income tax. Then it becomes your duty to find defendant guilty."

He then went on to say:

"If you do not so find and believe, or if you have a reasonable doubt thereof of the elements of the offense charged, then it equally becomes your duty to acquit the defendant and say so by your verdict."

Not content with that, the judge repeated:

"The applicable law in effect at the time and pertaining to the indictment provides substantially that any person who willfully attempts in any manner to evade or defeat any tax imposed under the law or the payment thereof, shall be guilty of a felony. Therefore, if you find that the defendant Ballantyne during the years in question willfully and knowingly attempted to evade and defeat a large portion of his income tax due and owning by him and his wife and caused to be prepared and filed with the district director a false and fraudulent income tax return on behalf of himself and wife, then it becomes your duty to find the defendant guilty."

He then charged the converse:

> "If you do not so find and believe, or if you have a reasonable doubt of any of the elements of the offense charged, then it becomes your duty to acquit."

Further he told the jury:

> "The word 'willfully' as used in these instructions means with a bad and evil purpose or without grounds for believing that one's act is lawful, or with a careless disregard whether one has a right to so act, and further the word 'wilful' used in these instructions also means with the knowledge of one's obligation to pay the tax due and with the intent to defraud the government of that tax."

Finally, appellant making a massive attack on what he calls a trial by charts, charges that the trial was conducted in respect of these charts so as to give them the effect of independent government evidence. The government invoking *Holland v. United States*, 348 U. S. 12, the cases it cites and those citing it, insists that the trial in this case with respect to those charts, in the light of the instructions given by the court with respect to them, was conducted in strict accord with the rulings and admonitions of the courts in such cases, and defendant was not prejudiced in respect thereto.

In the light of the whole record, including particularly the fair and able charge of the district judge, we think it must be held that the case was fairly and completely tried and without prejudicial error, and that the judgment must therefore be affirmed.

AFFIRMED.

APPENDIX B

JUDGMENT

Extract from the Minutes of August 3, 1961.

RAY C. BALLANTYNE,

versus

UNITED STATES OF AMERICA.

No. 18700.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

* * * * *
* * * *
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* *
*

APPENDIX C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18700

RAY C. BALLANTYNE,

Appellant

versus

UNITED STATES OF AMERICA,

Appellee

Appeal from the United States District Court for the Southern District of Texas

---

(October 11, 1961)

On Petition for Rehearing

Before HUTCHESON, RIVES and WISDOM, Circuit Judges.

PER CURIAM: Counsel for appellant, in his motion for rehearing, takes vigorous exception to this paragraph in the court's opinion:

> "Appellant did not testify, nor did he offer any convincing testimony in support of his claim that the monies he received on account of contracts were not income but were repayment of indebtedness and, therefore, a return of capital. Neither did he make proffer of any testimony which was refused by the district judge."

He argues that the first sentence in effect holds that defendant was obligated to take the stand in his own defense and that the second sentence incorrectly states in effect that the district judge did not exclude any testimony offered by the defendant.

The criticized language was not so intended and, because of its apparent ambiguity, is withdrawn. In the first sentence of the withdrawn paragraph, it was intended to say:

> "Appellant did not testify, nor did he offer any testimony having a tendency to support his claim, that the monies he received on account of the contracts with the City of Pasadena entered into by him, d/b/a Beco Engineering Specialties Company and as B & B Products Company, were not received by him as income but were repayments of indebtedness, and, therefore, the return of capital."

and this language is now substituted in the opinion for the language withdrawn.

In the second sentence, it was not intended to say that the district judge did not refuse to admit any testimony

offered by defendant. What was intended to be said and is hereby substituted for the withdrawn sentence was:

> "Neither did the district judge refuse to permit the defendant to make full proffer of evidence in support of his bill to the exclusion of testimony offered by him. As a matter of fact, while, the judge correctly refused to admit the testimony which he offered, because none of it was material to or tended to prove defendant's claim that the monies received by him on and from the contracts were not income but were repayments by his debtors of their indebtedness to him and were, therefore, a return of capital, he gave defendant's counsel the greatest latitude in stating the grounds of his offer and in making full proffer of the testimony he desired and proposed to offer."

No ground for granting a hearing, however, appearing, the motion for rehearing is

DENIED.

APPENDIX D

ORDER DENYING REHEARING

Extract from the Minutes of October 11, 1961.

RAY C. BALLANTYNE,

Appellant

versus

UNITED STATES OF AMERICA,

Appellee

No. 18700.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

APPENDIX E

The Statutes Involved

Section 145 (b) Internal Revenue Code of 1939; 26 USCA Section 145 (b)

Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

Section 7201 Internal Revenue Code of 1954; 26 USCA 7201.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

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No. 601

In the Supreme Court of the United States

OCTOBER TERM, 1961

RAY C. BALLANTYNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
LOUIS F. OBERDORFER,
Assistant Attorney General,
JOSEPH M. HOWARD,
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CITATIONS

Case:

McCandless v. *United States*, 298 U.S. 342 6

Statutes:

Internal Revenue Code of 1939, Sec. 145(b) (26 U.S.C. 1952 ed., Sec. 145(b)) 2

Internal Revenue Code of 1954, Sec. 7201 (26 U.S.C. 7201) 3

Miscellaneous:

1 Wigmore, Evidence, Sec. 17 (3d ed. 1940) .. 6

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was filed on December 11, 1961. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether, in a prosecution for income tax evasion, the district court erred in rejecting petitioner's offer of proof based on an alleged defense that monies received by petitioner constituted a repayment of indebtedness rather than taxable income.

STATUTES INVOLVED

Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.):

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

Internal Revenue Code of 1954 (26 U.S.C., 1958 ed.):

> SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

STATEMENT

An indictment in two counts was returned against petitioner in the United States District Court for the Southern District of Texas, charging him with wilful attempted evasion of his income taxes for the years 1953 and 1954, in violation of Section 145(b) of the Internal Revenue Code of 1939 and Section 7201 of the Internal Revenue Code of 1954. The indictment alleged that petitioner's actual net income was $22,503 for 1953 and $31,509 for 1954, whereas he had reported only $5,850 and $4,050 for the two years (R. 5–7). After a trial to a jury, petitioner was found guilty on both counts and sentenced to concurrent terms of two and a half years and to fines totalling $5,000 (R. 424–425). The court of appeals unanimously affirmed the conviction (Pet. 19–26, 28–30). The evidence to support the verdict may be summarized as follows:

Petitioner owned all the stock and was the managing officer of Balco, Inc., a corporation organized

in 1948 and engaged in construction work (R. 197–198). In 1950, after submitting a bid to the City of Pasadena, Texas, under the name Beco Engineering Specialities Company, a sole proprietorship,[1] petitioner entered into a contract to sell the city concrete pipe (R. 70, 263), the pipe to be installed by Balco under a separate contract with the city (R. 264). In 1953 petitioner received from the city in payment for the pipe $50,700 in checks made payable to Beco (R. 76). Petitioner, using the Beco name, had purchased the pipe from Standard Concrete Products Company at a cost of $33,696.58 (R. 306), and thus realized a net gain on the transaction of $17,003.42 (R. 310). Petitioner failed to report any part of this gain on his tax return for 1953 (R. 41, 331).[2] Petitioner kept no books or records concerning the Beco transactions (R. 193), advised his accountants through his bookkeeper that he had no other income for 1953 (R. 183), and reported as gross income that year only his salary of $6,500 from Balco (R. 41).

---

[1] Petitioner opened a bank account in the name of Beco Engineering Specialties Company, indicating to the bank that he had a partner named Orin G. Bennett, and that the company name was registered with the County Clerk (R. 143). Petitioner later admitted to revenue agents that Orin G. Bennett was nonexistent (R. 320, 329). No record of Beco was found in the assumed name files of the County Clerk (R. 155).

[2] The government, to show a consistent pattern of underreporting income in the pre-indictment years, also proved that petitioner had omitted from gross receipts $131,858.80 in 1950, $105,774.80 in 1951, and $23,017.80 in 1952, sums received under the same contract for the sale of pipe (R. 76, 78). Petitioner's cost for the pipe in those years was $40,490.39 in 1950, $91,032.91 in 1951, and $21,032.73 in 1952 (R. 105).

In December 1953, using the name of B & B Products Company, a sole proprietorship, petitioner entered into a similar contract with the City of Pasadena for the sale of concrete pipe (R. 84, 330). In 1954 petitioner received $54,600 from the city in payment for the pipe, in a single check made payable to B & B Products Company (R. 84). Petitioner had purchased this pipe from the Bayou Concrete Pipe Company at a cost of $26,560.65 (R. 162, 312), and thus realized a net gain on this transaction of $28,039.35, none of which amount was reported by petitioner in his return for 1954 (R. 312). No books or records reflecting the receipt of income from this transaction were kept by petitioner (R. 194), no bank account was opened in the company's name (R. 328), and petitioner's only reported gross income for 1954 was his salary from Balco of $6,300 (R. 312).

ARGUMENT

Petitioner's sole argument is that the trial court erred by preventing him from making proof on cross-examination of his bookkeeper that monies received by him on the sale of the pipe, in the names of the Beco Company and the B & B Company, were not, and were not considered by him to be, taxable income, but were repayments of indebtedness owing to him from Balco. Petitioner's contention here is that Balco was indebted to him in unliquidated amounts on account of his transfer to that company of certain assets upon its incorporation in 1948, and the monies received by him from the Beco and B & B pipe sales were in fact or were considered to be re-

payments of Balco's indebtedness to him since he "considered this B & B and Beco simply an adjunct and a part of the Balco Company operation" (Pet. 4).

The adequacy of an offer of proof, and the correctness of the ruling thereon, must be tested at the time the offer was made. 1 Wigmore, *Evidence,* Sec. 17(b) at 319 (3d ed.). Recognizing the "common sense rule * * * as to admissibility" (Pet. 15), this Court declared in *McCandless* v. *United States,* 298 U.S. 342, 346—

> An offer of proof cannot be denied as remote or speculative because it does not cover every fact necessary to prove the issue. If it be an appropriate link in the chain of proof, that is enough.

In this case, however, it was petitioner—not the court—who erred by failing to state the "chain of proof" in which the offered facts would be "an appropriate link."

The only fact that petitioner offered to prove was that, upon Balco's incorporation in 1948, he had transferred to it, without payment, construction equipment, contracts in process, and all his business good will. As we now understand petitioner's theory, that was to be one element of an alleged defense which would also have required proof of the following facts: that, although no evidence of indebtedness was given and no debt recorded on the corporation's books, the transfer of the assets was, rather than a contribution to capital, a "sale" of the assets to the corporation for an unliquidated amount that it still "owed" him; that, although entered into in the name of the sole proprietor-

ships, Beco and B & B, the pipe contracts with the city were actually entered into on behalf of Balco; that, although never recorded on the corporation's books or reported in its income tax returns, the receipts under the contracts belonged to Balco rather than petitioner; that, although the moneys were paid directly to petitioner by the city without going through the corporation's bank account, they were "constructively" received by Balco and then paid over by it to petitioner; that, although no debt was shown on the corporation's books, the moneys were paid over to him, not as a dividend, but in payment for the assets transferred by him in 1948; and that petitioner's original cost basis for the assets transferred exceeded the total amounts received by him (including the amounts received in the pre-indictment years) so there was no "gain" on the "sale" of the assets for which he was required to account. Petitioner's theory, in short, is that the offense of which he was guilty was that of evading the corporation's income taxes rather than, as charged, his own.

Conceding that such a defense, if proved, would be sufficient and that the elements need not have been proved in any particular order, nevertheless it was petitioner's obligation, when objection was made to the initial question, to inform the court of its materiality by stating in understandable fashion the chain of proposed proof of which the elicited testimony (the bare fact that a transfer of assets had been made) was to be a part. That petitioner failed to do, and he thereby failed to meet his own standard of admissibility.

Thus, there was nothing in petitioner's offer, counsel's accompanying statements, or in the record prior to that time, which revealed the theory of defense or petitioner's intention or ability to prove its various elements. Despite the assertion in the petition that the trial court understood at the time of the offer "that the Beco and B & B funds belonged to Balco" (Pet. 9), the record is to the contrary. Similarly, the statement quoted at the outset of the petition that "Petitioner considered this B & B and Beco simply an adjunct and a part of the Balco Company operation" (Pet. 4), came into the trial as virtually the last question asked by petitioner's counsel (R. 334), long after the trial court had ruled on the offer of proof. An examination of the record leading to and including the offer (R. 199–208) reveals that petitioner made no reference whatsoever to this alleged relationship among the companies.

In fact, by the time of the offer, the evidence had already established, without challenge by petitioner, several facts that were in direct conflict with the theory of defense which petitioner now claims was before the court. Extensive testimony had been received showing that the companies had been created and treated as entities distinct from one another. Petitioner's bookkeeper had testified that Beco was set up by petitioner as a partnership, separate from Balco (R. 191–192), that none of the receipts of Beco or B & B under the Pasadena contracts were ever recorded on the books or records of Balco (R. 187, 193–194), and that petitioner had instructed him to keep the Beco

money separate and apart from the Balco books and records (R. 186–187) and to treat any of the money that was transferred to Balco from Beco as a loan from Beco (R. 187). The bookkeeper had testified further that this arrangement had in fact been followed over several years and that when monies received by Beco under the pipe contract with Pasadena were on occasion transferred to Balco, they were shown not as income to Balco but as a liability to Beco (R. 187–188). Although this damaging evidence was elicited prior to the offer of proof, petitioner never attempted to cross-examine his bookkeeper (who was obviously hostile to the government, R. 193) as to these points so vital to the alleged defense. Nor did petitioner make any explanation of these conflicting facts to the court at the time of the offer. Instead, in response to the court's inquiry as to the materiality of the offer (R. 202), petitioner stated only that money received from Balco (not Beco or B & B Companies) was not taxable income since petitioner had the right to "become financially even with the corporation," *i.e.*, Balco (R. 202, 204).

There is still further indication that petitioner failed to present an adequate foundation for admission of the proof. Twice following the conclusion of the evidence—in a colloquy with the court (R. 405) and in a motion for a new trial (R. 419)—petitioner cited the court's rejection of the offer as prejudicial error. Although petitioner acted on both occasions after the earlier reference (R. 334) to the alleged "adjunct" relationship of Beco and B & B Companies

to Balco, in neither case did he spell out the theory of defense which the petition now claims was before the court and understood by the court at the time of the offer. Thus, the motion for a new trial claims only that the money received "was considered a return to him of sums owing to him because of such prior transfer to Balco * * *" (R. 419), and is silent as to Balco's relation to Beco and B & B Companies and to the Pasadena contracts and the income therefrom, as well as the cost or value of the assets transferred and the extent of the unrecovered cost remaining after the very large receipts from the Beco and B & B transactions in the pre-indictment years.

These facts show that petitioner had not presented its current theory of defense to the court at the time of the offer. Indeed, they cast in serious doubt whether that theory had even established itself in petitioner's mind or the mind of his counsel, to say nothing of its being brought home to the court. Under the circumstances it was the inadequacy of petitioner's offer in failing to state, indicate or provide any basis for the court to understand the chain of proof to which the offer was an appropriate link which brought about the rejection of the proof. And since the offer was inadequate when made, petitioner cannot rely upon the court's ruling as an excuse for his failure to renew the offer at a later point in the trial when—if ever—the theory of defense was made clear.

CONCLUSION

The decision of the court of appeals affirming the conviction is correct, and no conflict of decisions or

important question of law is involved. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1962.

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